

List of parties and counsel on signature pages.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

VOIP-PAL.COM, INC., a Nevada
corporation,

Plaintiff,

v.

TWITTER, INC., a Delaware corporation,

Defendant.

Case No. 5:18-cv-04523-LHK [Lead Case]

**DEFENDANTS' CONSOLIDATED
OPPOSITION TO PLAINTIFF'S MOTION
FOR LEAVE TO FILE A SUR-REPLY IN
OPPOSITION TO DEFENDANTS'
CONSOLIDATED MOTION TO DISMISS
PLAINTIFF'S COMPLAINTS**

JURY TRIAL DEMANDED

VOIP-PAL.COM, INC., a Nevada
corporation,

Plaintiff,

v.

CELLCO PARTNERSHIP d/b/a/ Verizon
Wireless, a Delaware corporation

Defendant.

Case No. 5:18-cv-06054-LHK

1 VOIP-PAL.COM, INC., a Nevada
2 corporation,

3 Plaintiff,

4 v.

5 AT&T CORP, a Delaware corporation,

6 Defendant.

Case No. 5:18-cv-06177-LHK

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8 VOIP-PAL.COM, INC., a Nevada
9 corporation,

10 Plaintiff,

11 v.

12 APPLE INC., a California corporation,

13 Defendant.

Case No. 5:18-cv-06217-LHK

1 This Opposition responds to Plaintiff VoIP-Pal's Administrative Motion for Leave to File
 2 a Sur-reply in Opposition to Defendants' Consolidated Motion to Dismiss ("Mot."). AT&T ECF
 3 No. 71. VoIP-Pal's Corrected Opposition ("Opp.") to Defendants' Motion to Dismiss is AT&T
 4 ECF No. 69, and Defendants' Reply ("Reply") is AT&T ECF No. 70.

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 Plaintiff VoIP-Pal.com, Inc.'s ("VoIP-Pal") motion for leave to file a sur-reply should be
 7 denied because it is untimely under Civil L.R. 7-3(d)(1), it lacks merit as Defendants' Reply does
 8 not introduce new material evidence, and it attempts to introduce a *second* improper declaration
 9 from VoIP-Pal's technical expert.

10 VoIP-Pal's motion is untimely. The stated objective of VoIP-Pal's motion for leave is to
 11 file a "sur-reply" "for the limited purpose of addressing new and extrinsic evidence" raised in
 12 Defendants' reply. AT&T ECF No. 71-1 at 1. Under Civil L.R. 7-3(d)(1), "if new evidence has
 13 been submitted in the reply, the opposing party may file [an Objection to Reply Evidence] within
 14 7 days after the reply is filed." Thus, the Local Rules provide a specific mechanism for
 15 responding to alleged new evidence—*i.e.*, the exact purpose VoIP-Pal articulates as the grounds
 16 for leave to file a Sur-Reply. Yet VoIP-Pal filed its motion for leave on March 13—13 days after
 17 Defendants' filed their Reply on February 28, and well beyond the March 7 deadline under Civil
 18 L.R. 7-3(d)(1).

19 The parties met and conferred on March 12 about VoIP-Pal's planned motion, and
 20 Defendants informed VoIP-Pal that its motion for leave and "sur-reply" are beyond the Civil L.R.
 21 7-3(d)(1) time limit. VoIP-Pal identified no justification or good cause for being untimely, but
 22 nonetheless filed the motion on March 13, six days after the deadline. The Court should deny the
 23 motion as untimely under Civil L.R. 7-3(d)(1). *Volterra Semiconductor Corp. v. Primarion, Inc.*,
 24 796 F. Supp. 2d 1025, 1037 n.11 (N.D. Cal. 2011) (citing Civil L.R. 7-3(d)(1), the Court denied
 25 "Defendants requested leave to file objections to evidence cited by Volterra in support of its reply
 26 briefs").

27 VoIP-Pal attempts to skirt Civil L.R. 7-3(d)(1) by positioning its motion as a motion for
 28 administrative relief under Civil L.R. 7-11. But a Civil L.R. 7-11 administrative motion is not the

proper vehicle for VoIP-Pal's requested relief. Civil L.R. 7-11 is reserved for "miscellaneous administrative matters, not otherwise governed by a federal statute, Federal or *local rule* or standing order of the assigned judge." Civil L.R. 7-11. Here, VoIP-Pal's motion is not administrative—e.g., requesting to exceed page limits or file documents under seal—it is an attempt to file an untimely Objection to Reply Evidence, which is governed by Civil L.R. 7-3(d)(1). VoIP-Pal's motion is thus improper under Civil L.R. 7-11.

The motion for leave also fails on the merits. VoIP-Pal contends the YouTube video depicting switchboard operators in the 1940s is new evidence. Not so. VoIP-Pal's Corrected Opposition to Defendants' Motion to Dismiss questioned "the historical fact that telephone operators routed calls in some fashion" for lacking foundation. Opp. at 20. In the Reply, Defendants' noted that the historical fact is readily ascertainable and properly subject to judicial notice, and as an example cited the YouTube video. Reply at 9 ("*See, e.g., Telephone Technology – 1940s–USA, YouTube, available at <https://www.youtube.com/watch?v=1801JMLNV9U>*").

Defendants did not introduce the YouTube video as evidence in the proceeding. Rather the video was cited as an example demonstrating that the historical fact that telephone operators routed calls is properly subject to judicial notice. Courts often take judicial notice of historical facts in deciding 12(b)(6) motions, and judicial notice is appropriate here. *Affinity Labs of Tex., LLC v. DirecTV, LLC*, 109 F. Supp. 3d 916, 926 (W.D. Tex. 2015) ("taking judicial notice of well-known, general historical observations was not error" and citing multiple cases where Federal Circuit has made historical observations on 12(b)(6) motions), *aff'd*, 838 F.3d 1253 (Fed. Cir. 2016). Thus, the YouTube video is not evidence, and VoIP-Pal's motion for leave is inapt.

Irrespective of the merits, the YouTube video relates to Defendants' analogy of how telephone operators routed calls, which merely illustrates the abstract nature of VoIP-Pal's asserted claims. As stated in the Reply, Defendants' "Motion does not depend on the Court's acceptance of this analogy." Reply at 8.

Notably, VoIP-Pal's motion for leave to file a sur-reply is a pretext to offer a *second* improper expert declaration in opposition to Defendants' Consolidated Motion To Dismiss. As

1 explained in Defendants' Reply, an expert declaration is not appropriate in opposition to a Rule
2 12 motion. Reply at 15. VoIP-Pal should not be allowed to use its proposed sur-reply as a means
3 to introduce additional improper evidence.

4 Finally, VoIP-Pal's case citations are distinguishable. In *Landmark Screens, Ltd. Liab.*
5 *Co. v. Morgan, Lewis & Bockius Ltd. Liab. P'ship*, the "[d]efendants did not cite . . . [a case] in
6 their moving papers, but [] discuss[ed the case] extensively in their reply brief." No. 5:08-cv-
7 02581-JF/HRL, 2010 U.S. Dist. LEXIS 95735, at *7 (N.D. Cal. Sep. 14, 2010). In *Altavion, Inc.*
8 *v. Konica-Minolta Sys. Lab., Inc.*, the "reply brief posed new arguments and relied upon cases
9 which had not been previously cited." No. C 07-06358 MHP, 2008 U.S. Dist. LEXIS 37768, at
10 *2 n.1 (N.D. Cal. May 7, 2008). And VoIP-Pal's citation to *Sharper Image Corp. v. Consumers*
11 *Union of United States, Inc.*, does not explain why a sur-reply was granted. Nos. 03-4094 MMC,
12 83, 208), 2004 U.S. Dist. LEXIS 23204, at *3 n.2 (N.D. Cal. Nov. 9, 2004) ("By order filed June
13 15, 2004, the Court granted Sharper Image leave to file a sur-reply"). In contrast to these cases,
14 here there is no justification for a sur-reply. VoIP-Pal takes issue with a YouTube video that is
15 cited once in a footnote regarding judicial notice and is not discussed in any detail. This is well
16 short of introducing extensive discussion or new arguments. VoIP-Pal's citations are thus
17 inapplicable.

18 CONCLUSION

19 For at least the foregoing reasons, VoIP-Pal's motion for leave to file a sur-reply should
20 be denied.

DATED: March 18, 2019

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ATTESTATION OF CONCURRENCE IN FILING

Pursuant to Northern District of California Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from the other Signatories to this document.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 18, 2019, a true and correct copy of the foregoing was served on all interested parties via electronic mail pursuant to Civil L.R. 5-1(h).

/s/ Gene W. Lee
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